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No. 585

FEDERAL POWER COMMISSION,
Petitioner,
vs.
AMERADA PETROLEUM CORPORATION
and
SIGNAL OIL AND GAS COMPANY,
Respondents.

On Petition and a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

PETITION FOR RESPONDENTS

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964.

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FEDERAL POWER COMMISSION,
Petitioner,

vs.

AMERADA PETROLEUM CORPORATION

and

SIGNAL OIL AND GAS COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITION FOR REHEARING

Amerada Petroleum Corporation (Amerada) and Signal Oil and Gas Company (Signal), Respondents herein, respectfully pray that this Court grant rehearing of its opinion dated February 1, 1965.

A principle which towers over the wrecks of time is that there can be no rehearing until there has been a hearing. Yet today we come before this Honorable Court praying for rehearing when in fact we have never been heard.

We have never been afforded an opportunity to present to this Honorable Court our arguments on the merits—and yet this Court has decided our case on the merits. Are we to be penalized because, instead of arguing the merits, we followed this Court's Rule 24 and directed our arguments to the only question before the Court, which was: Shall certiorari be granted?

We earnestly pray that before this Court reaches a conclusion that our case is "on all fours"[1] with *California v. Lo-Vaca Gathering Company*, ... U.S. .....; it should give us an opportunity to demonstrate why this statement, though no doubt thought by the writer to be correct, is plainly erroneous.[2]

All of the Gas Sold in Lo-Vaca Was Commingled; There Was Not a Separate Split Stream As in the Case at Bar.

In *Lo-Vaca*, this Court pointed out that:

> ". . . the gas sold by Lo-Vaca and Houston to El Paso will flow in a commingled stream with gas from other sources . . .
>
> * * *
>
> "The fact that a substantial part of the gas will be resold, in our view, invokes federal jurisdiction at the outset over the entire transaction."[3]

In the case at bar, all Amerada-Signal gas processed at the Tioga plant "will, as it has in the past continue to be divided into two gas streams upstream from the point of

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1. Slip Opinion 585, p. 3.

2. The Commission's brief on the *merits* in *Lo-Vaca* was comprehensive in scope and presented, from its point of view, all relevant arguments and authorities. This, we have not had opportunity to do.

3. Slip Opinions 46, 47 and 57, pp. 2 and 4

delivery and measurement" (R. 3). Of the 55,000 Mcf delivered on a peak winter day, only 5,000 Mcf will flow west and 50,000 Mcf will flow east. Of the 45,000 Mcf delivered on an average summer day, 13,000 Mcf will flow west and 32,000 Mcf will flow east (R. 8, 29).

It is an undisputed fact, *conceded* by the Commission, that *absolutely none* of the Amerada-Signal gas which flows to the *east* from Tioga will be commingled with the Hunt-Herbert and TXL gas, *all* of which flows to the *west* (Pet. 6; R. 7, 13, 29). Thus, even assuming *arguendo* that the Amerada-Signal gas which flows to the *west*, and which is commingled with Hunt-Herbert and TXL gas, is converted into a jurisdictional sale because of the commingling, this conclusion is clearly invalid as to the gas going *east* where there is no commingling.[4]

Every Mcf of the eastward flowing gas will be Amerada-Signal gas. Every Mcf of eastward flowing gas consumed by the North Dakota towns and communities as the gas travels along its way will be accurately measured and sold under the North Dakota Contracts. Every Mcf of eastward flowing gas which is not consumed as it travels along its way into Montana will be sold under the Amerada-Signal Interstate Contracts. Thus, contrary to *Lo-Vaca*, the factual situation is identical with the factual situation which obtained in *North Dakota* v. *Federal Power Commission*.[5] This is the situation which Mr. Justice Goldberg said "we need not and do not reach."[6] We respectfully submit that this statement is incorrect; the question must be "reached" and resolved.

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4. If this Court grants rehearing we will also demonstrate why the gas flowing west which is sold under the North Dakota Contracts is not subject to Commission jurisdiction.

5. 247 F.2d 173.

6. Slip Opinion 585, p. 4.

We do not have a "conjured up" factual situation which this Court alluded to in *Lo-Vaca*.[7] Instead we have a real live factual situation which does involve proportionate sharing. On a peak winter day the 50,000 Mcf of Amerada-Signal gas going east is *not* commingled with even so much as *one* Mcf of Hunt-Herbert or TXL gas going west. All of this gas is *wholly consumed* in North Dakota by consumers who were crying for the gas and who were urging that the new 106-mile line between Minot and Bismarck be constructed. This gas, consumed entirely within the State of North Dakota, is sold under the separate North Dakota Contracts. Absent commingling it cannot be a jurisdictional sale.

In the summertime those volumes of gas going to the east which are not metered off en route and which ultimately pass into Montana are sold under the Interstate Contracts, for by their very terms they cover "all gas . . . transported outside of the State of North Dakota and resold." (R. 105). But that gas flowing east which is not commingled, which is sold under a *separate* intrastate (North Dakota) contract, which is accordingly measured and consumed all within North Dakota cannot, we submit, be a sale in interstate commerce for resale. The "engineering and scientific" rationale of *Lo-Vaca* cannot apply;[8] none of the Hunt-Herbert or TXL molecules are present in the eastern pipeline—they are all moving to the west.

The Underlying Policy Considerations Which Persuaded This Court in Lo-Vaca Have No Application to the Case at Bar.

In 1951, Amerada drilled the first discovery well in North Dakota. This led to the discovery of the sizeable oil

7. Slip Opinions 46, 47 and 57, p. 5.

8. Slip Opinions 46, 47 and 57, p. 3.

and gas reserves which are known to exist in that state today. Amerada has supplied over the years a large amount of gas to both local and interstate consumers. Because of their willingness to make these gas supplies available—not as compressor fuel to a pipeline, but to consumers—Amerada and Signal entered into negotiations with MDU to satisfy a desperate consumer need for gas in a part of the world which has a reputation for being inordinately cold.

Recognizing that the "wealth of Midas and the wit of man cannot produce or reproduce a natural gas field,"[9] knowing that some of these volumes would be sold, transported and consumed *wholly within the state,* and knowing that the policy of the law permits intrastate transactions, Amerada and Signal first entered into the intrastate North Dakota Contracts. Also knowing that some of these gas volumes would be transported *beyond* the boundaries of the state, they also entered into separate interstate contracts and with respect to these sales, it is admitted that the Federal Power Commission has jurisdiction.

No one can deny that if a separate intrastate pipeline had been built to supply the North Dakota consumers with North Dakota gas, such sales would have been intrastate in character and clearly non-jurisdictional. Such a wasteful duplication of dollars and energy was avoided, however, by the two kinds of contracts which were entered into.[10] The legitimacy of these contracts, the legitimacy of the business purpose, and the vital need to get this gas on stream to the gas consumers has never been questioned.

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9. *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 629.

10. The cost of a parallel intrastate line would be considerable. That segment of MDU's line running from Tioga to Minot alone, built as an "*intrastate* line" had a "total cost" in excess of 5 million dollars on December 31, 1960 (R. 187).

Indeed, the North Dakota Public Service Commission supported the entire project which included both intrastate and interstate sales (R. 2).

Contrast this to *Lo-Vaca* where the Court challenged the legitimacy of the arrangements there entered into, saying:

> "A pipeline would then be able to discriminate in favor of its 'non-jurisdictional' customers. Moreover, a pipeline company by a contract clause could immunize a particular supplier from the reach of federal regulation.[2]" (Footnote by the Court).[11]

The Court, in its footnote, points out that by this device pipeline companies could pick or choose from their various suppliers eighty-five million dollars worth of gas to be used *as fuel for compressor stations*. But we are not selling gas for compressors; we are selling gas for consumers. We have been supplying the North Dakota markets for many years (R. 11). Thus, we say again: the policy reasons, the facts, the legal principles, simply are not parallel in these two cases.

Further, there is no "attractive gap" which this Court found to exist in *Lo-Vaca*. Indeed there is *no gap*—attractive or otherwise—in regulation or consumer protection in North Dakota.[12] At no time in these proceedings until we reached this Court did the Commission ever make the "attractive gap" argument which this Court found to be ap-

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11. Slip Opinions 46, 47 and 57, p. 4.

12. *Public Service Commission of North Dakota* v. *Montana-Dakota Utilities Company*, 100 N.W.2d 140.

plicable in *Lo-Vaca*. Knowing full well that this argument simply does not exist in the case at bar, it was never made until the Commission sought to "blanket" the case at bar with its argument in its Petition for Certiorari that "the reasons set forth in our brief in *Lo-Vaca*" also apply here (Pet. 9).

CONCLUSION

It has been said that the most difficult task for the advocate is to persuade any court—let alone the highest court in the land—that its judgment or opinion is clearly erroneous. And we are familiar with the statistics relating to the granting of rehearing by this Honorable Court.[13] But those statistics pertain to cases which have in fact been briefed and argued. Because the case at bar has not been *heard* on the merits, it should not be *reversed* on the merits.

We honestly feel that the Court surely did not realize the important fact and policy differences which exist in these two cases. They simply are not "on all fours" and we entreat this Court to give us the opportunity—and that is all we ask—the opportunity to present to you the significant legal and factual distinctions between these two cases. These distinctions, we submit, will show beyond all doubt why *Lo-Vaca* does not control the case at bar.

We pray for rehearing; we pray for an opportunity to brief and argue this case on its merits. In the alternative,

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13. Stern and Gressman, Supreme Court Practice, 3rd Ed., p. 385.

we pray that the Court affirm the Court below with respect to all volumes of Amerada-Signal gas which move to the east from the tailgate of the Tioga plant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Joseph W. Morris, one of the attorneys for Amerada Petroleum Corporation, one of the Respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of February, 1965, I served five copies of the foregoing Petition for Rehearing upon each of the following parties by air mail, postage prepaid:

Archibald Cox,
Solicitor General of the United States,
Department of Justice,
Washington 25, D. C.

Richard W. Solomon,
General Counsel,
Federal Power Commission,
Washington 25, D. C.

.....,
JOSEPH W. MORRIS.

CERTIFICATE OF COUNSEL

I, Joseph W. Morris, one of the attorneys for Amerada Petroleum Corporation, certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

.....,
JOSEPH W. MORRIS.